APPEAL NO. 92147
FILED MAY 29, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 20, 1991, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. By decision dated March 20, 1992, he found that claimant, respondent herein, has disability and ordered payment of temporary income benefits through the date of receipt of his decision. He also stated that claimant is entitled to all applicable medical benefits. Appellant asserts that disability should not be based upon the reports of a doctor who was not the treating physician, that a finding of disability is against the great weight of the evidence, that certain medical bills should not be paid because of respondent's failure to comply with Tex. W. C. Comm'n, 28 Tex Admin Code § 126.7(g) (rule 126.7(g)) and that the order regarding income benefits should only be applied through the date of the contested case hearing.

DECISION

Finding that the decision on the issues at hearing was not against the great weight and preponderance of the evidence, we affirm, but modify a portion of the decision extending past the date of hearing.

Respondent had been employed by (employer) as a janitor for two periods of approximately six months each, separated by school attendance, when he fell on (date of injury). At the time, no supervisor was present; he notified his supervisor, SG the next day and SG took him to a doctor. There is no dispute as to the injury or its compensability. Issues at the hearing were "who has been the Claimant's treating doctor since April 9, 1991" and "for what period of time, if any, did the Claimant have disability subsequent to the injury in question." The issue reported at the end of the Benefit Review Conference was "whether temporary income benefits are due Claimant?"

The appeal dated April 10, 1992, was timely filed. It recites that the decision of the hearing officer (sent by cover letter dated March 27, 1992) was received on March 31, 1992. The appeal also states that a copy of the appeal was sent to counsel for respondent by certified mail on April 13, 1992. Thereafter a "Supplemental Brief" with cover letter dated April 27, 1992 was received by the commission on April 27, 1992. April 27 is clearly more than 15 days from the date of receipt of the hearing officer's decision and the "Supplemental Brief" will not be considered. *See* Article 8308-6.41 of the 1989 Act and Texas Workers' Compensation Commission Appeal No. 92003 (Docket No. HO-00147-91-CC-1) decided February 12, 1992. The response to the request for review was timely made but new evidence found in the response will not be considered since Article 8308-6.42(a) restricts this appeals panel's review to the record developed at hearing and the appeal and response thereto.

Appellant's first contention on appeal is that Dr. Q's reports should not have been

used to indicate disability since the hearing officer found that he was not the treating doctor. Article 8308-1.03 (16) of the 1989 Act states, "Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." (There is a substantial amount of evidence indicating that Dr. Q was a treating doctor, but since respondent did not question the hearing officer's determination as to treating doctor, that issue is not before this panel.) Contrary to appellant's contention, the hearing officer could consider both Dr. Q's reports and the report of another physician to whom Dr. Q referred respondent as to respondent's condition and could also consider the testimony of respondent himself in regard to his inability to work because of the injury. *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. HO-00017-91-CC-2) decided October 16, 1991, Texas Workers' Compensation Commission Appeal No. 91024 (Docket No. LB-00015-91-CC-1) decided October 23, 1991, and Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. AU-00055-91-CC-1) decided November 21, 1991. The hearing officer could give one physician's opinion more weight than another's. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). Respondent stated that disability continued to the time of hearing (December 20) and Dr. Q, in a letter dated December 13, 1991, said disability was still present, although he used words better suited to the law prior to the 1989 Act. Accordingly, appellant's second assertion that a determination of disability was against the great weight and preponderance of the evidence is also rejected.

Although medical benefits were not an issue at the hearing, the hearing officer did address them in his decision by saying, "The Claimant is also entitled to recover all applicable medical benefits . . .," to which appellant states on appeal that claimant's disregard for rule 126.7(g) (respondent did not give notice of a change of treating doctor in the manner described in this rule) should not result in medical benefits related to Dr. Q's treatment.

Rule 126.7(g) implements Article 8308-4.62(a) of the 1989 Act. A review of pertinent parts of Article 8308-4.61 through 4.68 of the 1989 Act shows that all health care must be approved or recommended by the treating doctor (Article 8308-4.61). While treating doctor is defined at Article 8308-1.03(46) in a factual manner, "the doctor who is primarily responsible for the employee's health care for an injury," findings of fact, as stated, only name Dr. K as a treating doctor. In addition, there is no evidence that Dr. K recommended or approved Dr. Q to respondent. Next, Article 8308-4.62(a) allows a claimant to change doctors once "on submission to the commission in writing of the reasons for the employee's change in doctors." (We note that rule 126.7(g) merely adds specificity to that part of Article 8308-4.62(a) that addresses notification as to a change of doctors.) No approval need be given to the submission. Thereafter, Article 8308-4.65 addresses what may happen when a health care provider is "selected in a manner inconsistent with the requirements of this chapter", which includes both Article 8308-4.61 and 4.62. When the selection does not follow requirements "of this chapter," "the commission may relieve the insurance carrier." While Article 8308-4.65 appears to be completely discretionary, Article 8308-4.68(d) then alludes to the carrier sending a report to the health care provider, among other things, and

speaks of entitlement to a hearing under Article 8308-8.26(d), in regard to payment for health care. That article describes a hearing under the Administrative Procedures and Texas Register Act.

We should consider Articles 8308-4.65 and 4.68 in a manner that harmonizes and gives effect to both. *See* Everett v. U.S. Fire Ins. Co., 653 S.W.2d 948 (Tex. App.-Fort Worth 1983, no writ). Article 8308-4.65 in using the word "may" does not direct that the commission will relieve the carrier for certain health care when selection does not meet the criteria, including notice, of Article 8308-4.62. We note that Article 8308-4.65 does not even grant relief from payment to health care providers when selection is inconsistent with Article 8308-4.62(b) which does specify that the carrier has a right of approval when a third doctor is selected. Only Article 8308-4.68, within this chapter, provides criteria that can be applied to Article 8308-4.65. First, it says that unless the carrier disputes the amount or entitlement, it shall pay medical bills within 45 days. Leaving provisions not relevant aside, the article then calls for the carrier to send a report to the health care provider, the commission, and the injured employee explaining its reasons for denial. Then the carrier is entitled to an APTRA hearing as referenced, *supra*. The record discloses no evidence that the carrier has not paid medical bills; we note that there was no dispute as to medical benefits at the hearing. Even had there been an issue at hearing, the record indicates that no report, called for in Article 8308-4.68, was made by the carrier denying or reducing payment of medical bills.

The hearing officer in deciding that claimant is entitled to all medical benefits was not inconsistent with his conclusion of law that Dr. K was the treating doctor and that respondent failed to comply with rule 126.7, because the requirement for notice found in Article 8308-4.61(b) must be read with Article 8308-4.65 and 4.68, as discussed.

Appellant also takes issue with the hearing officer "ordering benefits to be paid from March 6 . . . ." While the hearing officer's decision does not give credit to certain temporary income benefits paid in March, his decision does not call for a double payment of some benefits. "The carrier is directed to compute the appropriate income benefit which has accrued from March 6 . . . ." That statement allows the carrier to take credit for those temporary income benefits, which it can show have been correctly paid since March 6, in computing an "appropriate" amount. *See* Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991.

Finally appellant states that the decision erred in specifying benefits be paid past the date of hearing, December 20, 1991, and up to the date the hearing officer's decision is received, March 31, 1992. In making this point appellant calls attention to rule 142.16(c) which allows 10 days for the hearing officer to file his opinion. In this instance failure to provide a decision for 80 days past that time period raised a question as to the accuracy of the decision as affected by respondent's status after the hearing. To avoid these and similar problems and to effect the policy of resolving disputed matters in a timely manner, adherence to the requirement set forth in rule 142.16 should be given every reasonable

priority. That part of the decision in question is directed primarily at the payment of a lump sum for periods up to the present. (In contrast, Article 8308-4.21(b) requires that benefits currently coming due be paid weekly.) Article 8308-4.21 also says in essence that once compensability is found, future steps do not necessarily have to be spelled out through a hearing or specific points made in a hearing officer's decision. For instance, the parties should follow Article 8308-4.21 to continue temporary income benefits so long as disability continues (*See* Texas Workers Compensation Commission Appeal No. 91045 (Docket No. AU-00055-91-CC-1) decided November 21, 1991) or until Maximum Medical Improvement is attained. (*See* Texas Workers' Compensation Commission Appeal No. 91125 (Docket No. HO-00159-91-CC-1) decided February 18, 1992.

We recognize the changing nature of liability and responsibility resulting from a compensable injury as set forth by various provisions of the 1989 Act. "In judicial proceedings courts apply law to past facts which remain static and on the other hand administrative bodies are concerned with fluid facts and changing policies." Killingsworth v. Broyles, 300 S.W.2d 164 (Tex. Civ. App.-Austin 1957, no writ). To allow for conditions that could affect a decision during the extended period after the date of this hearing, we modify the last sentence of the decision to read "The carrier is directed to compute and pay appropriate income benefits that have accrued since March 6, 1991, but have not previously been paid, and to pay that amount in a lump sum up to the date of receipt of this decision, unless respondent's entitlement to income benefits has ceased after the date of hearing, then the lump sum payment will only include the amount due up to the date entitlement ends. Article 8308-4.21(b) directs that after receipt of this decision, income benefits to which respondent is entitled shall be paid without order on a weekly basis."

With the decision modified as set forth, we affirm.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge